

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**EYM KING OF MISSOURI,
D/B/A/ BURGER KING**

Case 14-CA-188832

And

**WORKERS' ORGANIZING COMMITTEE,
KANSAS CITY**

**BRIEF IN SUPPORT OF GENERAL COUNSEL'S
EXCEPTIONS TO THE DECISION OF THE
ADMINISTRATIVE LAW JUDGE**

Rebecca Proctor
Counsel for the General Counsel
National Labor Relations Board, Subregion 17
8600 Farley—Suite 100
Overland Park, KS 66212

Counsel for the General Counsel respectfully files this brief with the National Labor Relations Board. This case is before the Board based on a Complaint alleging that Respondent, EYM King of Missouri, L.L.C., doing business as Burger King, violated Section 8(a)(1) of the National Labor Relations Act when the Wendell Toombs, General Manager of the 1102 East 47th Street store, threatened to discharge store employees for participating in union and protected, concerted activities. On June 30, 2017, Administrative Law Judge Christine E. Dibble conducted a hearing in this matter. Following submission of briefs by the parties, Judge Dibble issued a decision, dated September 29, 2017, in which she concluded that Respondent did not violate the Act because she found witnesses for both sides to be “equally credible” and therefore determined General Counsel had not met its burden.

As discussed below, in reaching her decision Judge Dibble did not perform an appropriate credibility analysis and failed to make a credibility resolution, simply concluding the witnesses were “equally credible” in demeanor. ALJD, p. 5 6-7. Judge Dibble additionally stated she found “little in the record to indicate that Brown’s testimony is likely to be more credible than Toombs’s testimony or vice versa” ALJD, p. 5 8-10. This misstates the record, which directly contradicts many portions of Mr. Toombs’s testimony. Even if the ALJ’s finding that the witnesses were equally credible in demeanor is accepted, the record as a whole fully supports a finding that Ms. Brown was the more credible witness. Mr. Toombs recalled few details regarding the events of November 28, 2016, and based large portions of his testimony on Respondent’s Exhibit 1, however the ALJ declined to rule on the credibility of Respondent’s Exhibit 1 despite obvious problems with the same. Ms. Brown’s account of events is corroborated by conversations with two acknowledged supervisors/agents whose statements should be found to be admissions and not excluded as hearsay.

Because the overall record in this case supports Ms. Brown's testimony, Counsel for the General Counsel requests that the Board reverse the ALJD and find that Respondent violated Section 8(a)(1) of the Act by threatening to discharge probationary store employees of the Burger King at 1102 East 47th Street for participating in a strike.

I. FACTS

Respondent operates a number of Burger King franchises in the Kansas City area, including the restaurant located at 1102 East 47th Street, the only facility involved in this case. GC Ex. 1-E, GC Ex. 1-H. During all relevant periods, Wendell Toombs was the General Manager of the 47th Street Store. GC Ex. 1-E, GC Ex. 1-H.

The Workers Organizing Committee of Kansas City (WOC) scheduled a one-day strike for November 29, 2016. Tr. 22. On November 28, 2016, Kadijah Brown reported to work at the 47th Street Store around 2:00pm. Tr. 10. Shortly after arriving, Ms. Brown joined in a conversation between General Manager Toombs and other employees because she heard Mr. Toombs say he "was firing people who went on strike." Tr. 10. As the conversation continued, Mr. Toombs explained that since Ms. Brown and another employee, Laneqwa Williams, had been employed for less than ninety (90) days and were on probation, Ms. Brown and Ms. Williams could be fired for going on strike. Tr. 11. Mr. Toombs went on to say that he wouldn't fire Ms. Brown and Ms. Williams immediately, but would wait for a week or two "so that the two incidents didn't look tied together." Tr. 11. Because Ms. Brown believed Mr. Toombs might try to fire her, she subsequently talked with two shift managers, who are admitted supervisors and agents and below Mr. Toombs in the management hierarchy, and was told Mr. Toombs was trying to scare employees so they would not go on strike. Tr.12. Mr. Toombs was

not part of these conversations, and never told Ms. Brown or other employees they could not be fired for going on strike. Tr. 13.

A short time later on November 28, 2016, Ms. Brown and Ms. Williams spoke with Jeremy Al-Haj from WOC about Mr. Toombs's threat to fire them for going on strike. Tr. 14. Mr. Al-Haj advised Ms. Brown and Ms. Williams they had the right to go on strike, regardless of their probationary status. Tr. 23. Mr. Al-Haj returned to the store at the end of Ms. Brown's shift, and gathered information from Ms. Brown to file a charge. Tr. 23. The instant charge was filed later the same day. GC Ex. 1-A. A few days later, representatives from WOC, community leaders, and religious leaders came to the 47th Street Store to talk with Mr. Toombs about what was alleged and provide him a copy of the charge. Tr. 58-59.

II. EXCEPTIONS

A. Statement of Exceptions

As further analyzed below, the record overwhelmingly corroborates the testimony offered by Kadijah Brown. **Exception 3.** The ALJ did not consider testimony in the full context of the record when she found Brown and Toombs equally credible and did not provide any analysis regarding how she resolved the internal contradictions within Toombs's testimony or the contradictions between his testimony and the record. **Exceptions 1 and 3.** Additionally, although Toombs's recollection of the November 28, 2016 conversation was based on Respondent's Exhibit 1, the purported schedule for that date, the ALJ failed to make a credibility finding regarding Respondent's Exhibit 1. **Exception 2.** Rather than scrutinizing Mr. Toombs's testimony, the ALJ erroneously accepted Mr. Toombs's representations at face value and supported that decision with credibility findings unsupported by the record. **Exception 3.** By contrast, the ALJ gave no weight to portions of Ms. Brown's testimony that under the Rules of

Evidence should have been considered admissions. **Exception 4.** Accordingly, the Board should reverse the ALJD and find the Respondent violated the Act as alleged in the Complaint.

B. Legal Framework

When analyzing 8(a)(1) violations, the basic test is whether considering all of the circumstances, the employer's conduct would reasonably tend to restrain, coerce, or interfere with employee rights provided under Section 7 of the Act. *Mediplex of Danbury*, 314 NLRB 470, 472 (1994). Additionally, "it is well settled that the test of interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on the employer's motive or whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act." *American Freightways Co.*, 124 NLRB 146, 147 (1959). In determining whether a remark made by an employer's agent rises to the level of a threat, the appropriate test is whether the remark can reasonably be interpreted by the employee as a threat." *Smithers Tire and Automotive Testing of Texas, Inc.*, 308 NLRB 72 (1992).

Accordingly, it is immaterial whether any employees were disciplined or discharged for going on strike. At issue is simply whether statements made by Wendell Toombs (that probationary employees could be fired for going on strike and that he would wait a couple of weeks before the firing so the strike and the discharge would appear unrelated) can reasonably be seen as interfering with the free exercise of employee rights under the Act.

Because this charge centers on the contents of a conversation, any disputes about what did and did not occur can only be resolved by assessing witness credibility. A credibility determination may stem from various factors, including "the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts,

inherent probabilities and reasonable inferences that may be drawn from the record as a whole.” *Hills & Dales General Hospital*, 360 NLRB 611, 617 (2014), citing *Double D Construction Group Inc.*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001). A trier of fact may believe some, but not all, of a witness’s testimony when making credibility resolutions. *NLRB v. Universal Camera Corp.*, 179 F. 2d 749 (2nd Cir. 1950).

The Board’s established policy is not to overrule an administrative law judge’s credibility resolutions unless the clear preponderance of all relevant evidence shows those determinations are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd* 188 F.2d 1208 (7th Cir. 1979); *Diversified Chemicals Corp.*, 232 NLRB 928, 983 fn. 7 (1977). However, if what is at issue is the record and not the witnesses’ demeanor, “the Board is as capable as the judge of analyzing the record and resolving credibility issues.” *Samsung Electronics America, Inc.*, 363 NLRB No. 105, p. 2 (2016).

C. Argument

1. The Judge Failed to Make Credibility Findings

The ALJ found “Brown and Toombs appeared equally credible on the issue of whether Toombs made the threatening statements. Neither was superior to the other in terms of their demeanor. Moreover, I find little to nothing in the record to indicate that Brown’s testimony is likely to be more credible than Toombs’ testimony or vice versa.” ALJD, p.5. This finding misstates the record. If the witnesses are equally credible in demeanor, the ALJ should have considered the record as a whole and the reasonable inferences and inherent probabilities that can be drawn from that record. The ALJ did not include such discussion or findings in her decision.

It is undisputed there was a conversation between General Manager Toombs and one or more employee(s) of the 47th Street Store on November 28, 2016 about the WOC strike

scheduled for November 29, 2016. In dispute is who participated in the conversation and what was said.

Respondent's defense, as laid out through Mr. Toombs's testimony, was that Mr. Toombs never engaged in conversation about the November 29, 2016 strike with Ms. Brown because Ms. Brown was not in the store and did not work on November 28, 2016. (Tr. 34, 4-5). However, taken in context with the rest of Mr. Toombs's testimony, this statement is demonstrably wrong. Mr. Toombs, by his own admission, lacks memory regarding the events of November 28, 2016. Mr. Toombs stated, "...I don't even remember all of the employees that were working on that specific day. I have them on my schedule." Tr. 35. When asked if he could recall any employees who were involved in the conversation, Mr. Toombs said, "No, I really don't." Tr. 35. Mr. Toombs stated he did not remember "because I never knew all of this was even going to happen, is because I didn't—it was nothing that I expected." Tr. 35. Then Mr. Toombs said, "The only employee who was there at that time while we were having that conversation was Shannon Ruth, I believe it was." Tr. 35.

The testimony is internally inconsistent. Toombs first said definitively he did not have a conversation with Kadijah Brown, because she did not work that day. Then, Toombs said he could not recall any employees who were involved in the conversation. Toombs followed up those statements by saying said he knew who was present for the conversation based on the work schedule (Respondent's Exhibit 1). Toombs then stated that employee Shannon Ruth (who was not listed on Respondent's Exhibit 1 as working November 28, 2016) was the only employee present for the conversation. All of the statements conflict with each other. If Mr. Toombs has no memory of who participated in the conversation, he cannot credibly deny having a conversation with Kadijah Brown. If Mr. Toombs claims the only way he knows who was

present is by consulting Respondent's Exhibit 1, he cannot credibly claim he spoke only with Shannon Ruth, because she is not on the schedule for that day.

Mr. Toombs's testimony about the events of November 28, 2016 does not present a consistent, coherent narrative. Not only did Mr. Toombs contradict himself multiple times, there was no corroboration of any sort for Mr. Toombs's statements about who participated in the November 28, 2016 conversation or what was said. Additionally, if Mr. Toombs claims no memory of who he spoke with that day, it can be reasonably inferred that he does not remember all relevant and specific details about what was said.

The ALJD acknowledges Mr. Toombs does not remember who was present for the conversation, but does not acknowledge the internal inconsistencies and gaps in Mr. Toombs's testimony, and does not contain any analysis regarding how, in light of those inconsistencies, Mr. Toombs's testimony was found equally as credible as Kadijah Brown's testimony.

2. The ALJ Did Not Rule on the Credibility of Respondent's Exhibit 1

The ALJ stated because Brown's testimony she was at the restaurant on November 28, 2016 could be credited independent of Respondent's Exhibit 1, and because "the merits of the case will be based entirely on credibility findings" there was no need to rule on the credibility of Respondent's Exhibit 1. ALJD, 5. The ALJ's conclusion ignores the fact that Respondent's Exhibit 1 was offered for two purposes: to establish Ms. Brown was not in the restaurant on November 28, 2016, and to provide a basis for Mr. Toombs's testimony about the events of that day. As noted above, Mr. Toombs stated the only way he remembered who was present on November 28 was by looking at Respondent's Exhibit 1.

Mr. Toombs's testimony was clear: he never expected the events of November 28, 2016 to be of any consequence and as a result does not have clear memory of any details. Mr. Toombs

also repeatedly stated the only way he remembers who was at work on November 28, 2016 is by the schedule, Respondent's Exhibit 1. The ALJ's findings only addressed Respondent's Exhibit 1 with regard to Ms. Brown's presence in the restaurant. The ALJ ignored that Respondent's Exhibit 1 provided the foundation for details Mr. Toombs provided about November 28. Given Toombs's reliance on Respondent's Exhibit 1 to refresh his recollection, it is difficult to understand how any portion of Mr. Toombs's testimony about the events of November 28 can be credited if Respondent's Exhibit 1 is not credible.

Respondent's Exhibit 1 is relevant not only because it was used to refresh Mr. Toombs's recollection, but also because Toombs's representations about Respondent's Exhibit 1 should be considered when determining Mr. Toombs's overall credibility. As discussed in detail in both Counsel for the General Counsel's Post-Hearing Brief, and Charging Party's Post Hearing Brief, Respondent's Exhibit 1 is a complete work of fiction. It shows individual employees working over one hundred hours more per week than it is even theoretically possible to work, it shows employees who are double scheduled (one employee filling two separate headcount spots on overlapping shifts), and it shows extremely low staffing levels that do not correspond with any record testimony regarding necessary staffing. Of the forty employees working at the 47th Street Store, only seventeen are reflected on Respondent's Exhibit 1 as working during the week at issue. Mr. Toombs himself testified it would be "absolutely" unusual for so many store employees not to work at all over the course of a week. Tr. 42.

Despite these issues, and despite the fact it is not even physically possible for employees to work as scheduled on Respondent's Exhibit 1, Mr. Toombs presented Respondent's Exhibit 1 as an accurate and correct document. This is demonstrably untrue and should factor into Mr.

Toombs's overall credibility. By refusing to make a credibility finding on Respondent's Exhibit 1, the ALJ excuses and disregards this untruth.

3. The Record Overwhelmingly Supports Ms. Brown's Testimony

While the ALJ found Ms. Brown and Mr. Toombs had similar demeanor, she determined there was nothing in the record that supported one over the other. This statement is erroneous, as Ms. Brown's testimony is supported by multiple portions of the record.

First, and most obvious, Ms. Brown's testimony is supported by testimony from Jeremy Al-Haj, WOC Organizer who was in the restaurant during Ms. Brown's shift on November 28, 2016. When he entered the restaurant that day, Mr. Al-Haj was approached by Laneqwa Williams and Kadijah Brown. Mr. Al-Haj testified, "They said to me that they were concerned because Wendell, Mr. Toombs, had told them that if they were there for less than ninety days, that they were still on probation, and that they could be fired for going on strike." Tr. 24. The conversation with Mr. Toombs took place sometime between 2:00pm and 3:00pm; Mr. Al-Haj testified that he arrived at the restaurant "around three o'clock." Tr. 25. The account provided to Mr. Al-Haj by Ms. Williams and Ms. Brown was contemporaneous in time to the conversation with Mr. Toombs. Respondent's counsel objected to this testimony as hearsay, but was overruled. Mr. Brown also testified that he "returned at the end of Kadijah Brown's shift" to meet with her and further discuss the conversation with Mr. Toombs in order to file a charge and did in fact file a charge on that same day. Tr. 23-24.

The ALJ found Mr. Al-Haj's testimony as corroborating that Ms. Brown was at the 47th Street Store, but not as corroborating that Ms. Brown was working that day and not as corroborating the contents of Ms. Brown's conversation with Mr. Toombs. This finding ignores the record. Mr. Al-Haj specifically testified that Ms. Brown was on shift, and that he returned at

the end of her shift. Mr. Al-Haj also testified that upon his arrival at the restaurant that day, both Laneqwa Williams and Kadijah Brown approached him and said Mr. Toombs had told them they could be fired for going on strike. Mr. Al-Haj's testimony was properly allowed in over Respondent's hearsay objection and can be admitted under either FRE 803(1) or under FRE 807. Mr. Al-Haj's testimony regarding what he was told by both Ms. Williams and Ms. Brown corroborates the substance of Ms. Brown's testimony and goes to prove a material fact: that Mr. Toombs did in fact threaten to fire probationary employees who went on strike. If Mr. Toombs did not make a threatening statement, there would have been no reason for Ms. Brown and Ms. Williams to approach Mr. Al-Haj with concerns about being fired for striking.

Second, as discussed in Counsel for the General Counsel's post-hearing brief, Respondent's Exhibit 2, Notice of Unconditional Return to Work, corroborates Ms. Brown's testimony rather than Mr. Toombs's testimony. If, as Mr. Toombs alleges, Ms. Brown was not scheduled to work at all during the week of November 28, 2106, Ms. Brown could have participated in the scheduled protests and other events and returned to work on her next scheduled day without fear of reprisal. If Ms. Brown would not have missed work for the November 29, 2016 strike, there is no reason for her to provide unconditional notice to return to work.

Third, Respondent provided no witnesses who could in any way corroborate Mr. Toombs's version of events. Although Respondent called store employee Rahman Sallee, neither Respondent, nor Mr. Sallee himself, claims that Mr. Sallee was present for the November 28, 2106 conversation. There is nothing on the record, either in exhibits or testimony, supporting any portion of Mr. Toombs's account of what happened on November 28, 2016.

4. The ALJ Disregarded Admissions as Hearsay

Ms. Brown testified she was so concerned about being fired for going on strike that she spoke with two supervisors/shift managers, Quashae Roper and Cornelius McFadden, both of whom told her Mr. Toombs would not fire her, but was instead trying to scare her so she would not go on strike. Tr. 12. In the ALJD, footnote 9 on page 4, the ALJ ruled this testimony hearsay and gave it no weight. The ALJ's ruling is erroneous. Under FRE 801(d)(2), statements made by an agent in the scope of employment are considered admissions, not hearsay. In its Amended Answer, Respondent admitted Roper and McFadden were supervisors and agents. Ms. Brown approached both Roper and McFadden at work, in their capacities as Shift Managers, to determine if she could be fired for going on strike. Both responded to her in their capacity as Shift Managers. Accordingly, the statements Roper and McFadden made to Brown about Mr. Toombs trying to scare her so she would not go on strike are admissions and should be given weight as admissions. Respondent called neither Roper nor McFadden to rebut Ms. Brown's testimony.

When this portion of Ms. Brown's testimony is combined with Mr. Al-Haj's testimony, it demonstrates both the depth of Ms. Brown's concern and the coerciveness of Mr. Toombs's statements. Even after receiving assurances from two shift managers that she could not be fired, Ms. Brown still felt it necessary to consult her union representative before participating in the strike. Tr. 11-12.

5. The Record Demonstrates 8(a)(1) Violations

The Complaint in this case is specific to the 8(a)(1) violations related to Employer's threat to fire probationary employees for striking. However, the hearing record documents other 8(a)(1) violations. Mr. Toombs testified that employees were talking about the strike. Tr. 34.

He said he asked employees, “You guys going on strike?” Tr. 34 and then asked additional questions regarding strike pay and reasons for the strike. Tr. 35-36. He also requested any employee planning to strike notify him of his/her intent to strike. Tr. 35-36.

As of November 28, 2016, EYM King was already involved in another unfair labor practice proceeding regarding termination and refusal to hire employees due to protected, concerted activity. The information sought by Mr. Toombs, which employees were going on strike, is information on which Employer could base action against individual employees. As General Manager, Toombs was the highest ranking official who regularly worked at the 47th Street Store. The questions were asked in store, with all working employees present on the day before a planned strike. The conversation’s overall context points to a coercive interrogation. This was followed by agents/supervisors Quashae Roper and Cornelius McFadden separately telling Ms. Brown Toombs was “just trying to scare” employees into not going on strike. Tr. 12-13. Taking all of the questions and statements together, it is clear that Mr. Toombs was trying to coerce or restrain employees’ exercise of Section 7 rights.

III. CONCLUSION

The record establishes that the Respondent violated Section 8(a)(1) of the Act by threatening to discharge store employees of the Burger King at 1102 East 47th Street for participating in a strike. Accordingly, Counsel for the General Counsel requests that the Board reverse the ALJD and issue an appropriate order requiring Respondent to cease and desist from such unlawful conduct.

Respectfully submitted,

/s/ Rebecca Proctor
Counsel for the General Counsel

Date: October 26, 2017